HO YOKE KWEI & ANOR

v.

ONG ENG HIN

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CIVIL APPEAL NO: 11-21 OF 1994]
24 AUGUST 1996

CIVIL PROCEDURE: *Pleadings - Amendment of - Whether can include something not originally in it.*

CIVIL PROCEDURE: *Pleadings - Counterclaim - Whether can be added to defence by way of amendment - Whether leave of Court necessary - Before or after close of pleadings - Whether counterclaim must be added to original defence - Whether counterclaim may be added to defence at any stage of proceedings.*

CIVIL PROCEDURE: *Pleadings - Counterclaim - Addition of counterclaim by way of amendment - Whether leave of Court necessary - Whether closure of pleadings material - Subordinate Courts Rules 1980, O. 15 r. 1(1)*

CIVIL PROCEDURE: *Pleadings - Counterclaim - Whether addition of appellants' counterclaim a consequential amendment following respondent's amendment to statement of claim - Whether addition of appellants' counterclaim to defence in contravention of O. 15 r. 1(1) of Subordinate Courts Rules 1980 for want of leave*

CIVIL PROCEDURE: *Rules of Court - Non-compliance - Subordinate Courts Rules 1980 - Whether an irregularity - Whether will nullify proceedings - Order 2 r. 1 - Whether distinction between nullities and irregularities still exist - Order 2 r. 1(1) - Whether Court still has discretion to remedy irregularities - Order 2 r. 1(2).*

CIVIL PROCEDURE: *Pleadings - Counterclaim - Leave of Court not obtained under O. 8 r 1(1) of Subordinate Courts Rules 1980 - Whether an irregularity - Whether can be cured retroactively under O. 2 r. 1 - Whether party concerned must apply to rectify irregularity.*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of Court - Whether can be invoked to override express statutory provisions - Whether O. 2 r. 1 of Subordinate Courts Rules 1980 affected by inherent powers of Court.*

CIVIL PROCEDURE: *Affidavits - Need to reply specifically to allegations - Consequence of unspecific reply - Whether allegation not replied to regarded as accepted.*

CIVIL PROCEDURE: *Irregularity - Application to set aside - Subordinate Courts Rules 1980, O. 2 r. 2(1) - "Reasonable time" - Meaning of - Whether reasonable time after becoming aware of irregularity.*

CIVIL PROCEDURE: *Estoppel - Knowledge of facts - Whether a dominant feature in law of estoppel - Doctrine of election - Doctrine of acquiescence.*

This was the appellants' appeal against the striking out of their counterclaim against the respondent. The events leading up to the instant appeal were as follows. The respondent (the plaintiff in the Court below) filed a claim against the appellants for vacant possession of certain premises in Melaka on 10 June 1992. The appellants filed their statement of defence on 24 August 1992, and pleadings were deemed to have closed on 8 September 1992. The respondent then amended his statement of claim with leave of Court and served it on the appellants on 11 May 1993. On 2 September 1993, the appellants, without leave of Court, filed an amended defence which had a counterclaim added to it. The respondent filed his reply to the appellants' amended defence and counterclaim on 26 October 1993. On 25 August 1994, the respondent wrote to the Magistrate's Court protesting against the appellant's said counterclaim which was added by way of an amendment without leave of Court. On 5 September 1994, the respondent filed an application to strike out the appellants' counterclaim. This was allowed by the Magistrate's Court which held that there is no provision in the Subordinate Courts Rules 1980 ('the SCR') authorising the addition of a counterclaim to an amended defence.

On appeal, the appellants submitted that the SCR is silent on the requirement of leave of Court as regards the adding of a counterclaim to an amended defence; that as the respondent had taken a fresh step in the proceedings by filing a reply to the amended defence and counterclaim, he was precluded from objecting to the counterclaim later; that it was too late for the respondent to object as his application to strike out the counterclaim was made after a delay of some ten months and after the case had been set down for trial; and that the respondent was estopped from raising any objection by reason of his conduct and by the doctrine of acquiescence.

Relying on *The Supreme Court Practice 1985*, p. 337, the respondent submitted that the appellants' right to amend their defence, without leave, was limited to making only such amendments as were consequential upon the amendments made to the respondent's statement of claim. The respondent

further submitted that, pursuant to O. 8 r. 2(1) of the SCR, a counterclaim can only be added to an original defence; that the appellants' right to introduce their counterclaim was confined to the time provided for the service of their defence; that estoppel does not operate against a statute; and that the counterclaim was a nullity as it was introduced without leave of Court.

Held:

[1] An amendment to a pleading can include the addition of something that was not originally in it. This means that a counterclaim can be added to a defence by way of an amendment. It may be done without leave of Court before the close of pleadings under O. 20 r. 3 of the Rules of the High Court 1980 ('the RHC'), and with leave of Court after the close of pleadings under O. 20 r. 5(1). Furthermore, O. 15 r. 2(1) RHC merely provides that a counterclaim must be added to the 'defence'; it does not stipulate that a counterclaim must form part of the 'original defence'. Consequently, a counterclaim may be added to the defence at any stage of the proceedings.

[1a] The power of the Court to allow such amendments is subject to the injunction contained in O. 20 r. 5(2) & (5) of the RHC. The general power to amend under O. 20 r. 5(1) of the RHC is subject to O. 20 r. 5(2) but the restriction therein does not apply where the application for leave to amend is made before the expiry of the limitation period. In such circumstances, therefore, an application to add a counterclaim may be made under O. 20 of the RHC. The equivalent provision governing the subordinate Courts is O. 15 of the SCR. Accordingly, an application to add a counterclaim may be made at any time provided the limitation period has not expired.

[2] The consequential issue in the instant appeal was whether leave of Court is required under the SCR to add a counterclaim by way of an amendment. The words "... the Court may ... allow ..." in O. 15 r. 1(1) of the SCR presupposes the fact that the Court must be moved before it can be in a position to allow an application to amend. Consequently, amendments to pleadings under the SCR, whether before of after the close of pleadings, can only be made with leave of Court.

[2a] However, the SCR contains no provisions dealing with consequential amendments by the other party following an amendment to a pleading - unlike O. 20 r. 3 of the RHC which allows such amendments. Thus, in accordance with O. 4 r. 4(1) of the SCR, the prevailing practice and procedure of the High Court may be adopted and followed by the subordinate Courts.

[2b] Nevertheless, the addition of the appellants' counterclaim was clearly not a consequential amendment following the respondent's amendment to his statement of claim. In the upshot, the addition of the appellants' counterclaim to their defence was in contravention of O. 15 r. 1(1) of the SCR as it was done without leave of Court.

[3] Order 2 r. 1 of the SCR says in unambiguous terms that a failure to comply with the rules shall be treated as an irregularity and shall not nullify the proceedings. Under O. 2 r. 1(1) of the SCR, the old distinction between nullities and irregularities no longer exist. However, in accordance with O. 2 r. 1(2) of the SCR, the Court still has the discretion to decide whether it should exercise its powers to remedy an irregularity. Judicial activism has placed some guidelines on the exercise of that discretion.

[3a] An amendment to a pleading that has been made without leave of Court as required by O. 8 r. 1(1) of the SCR amounts to an irregularity which can be cured retroactively under O. 2 r. 1. Thus, the addition of the counterclaim by the appellants without leave of Court was an irregularity that could be remedied. However, no application was made by the appellants to have the irregularity rectified.

[4] The inherent powers of the Court cannot be invoked to override express provisions in the SCR. Order 2 r. 1 of the SCR is not affected by the inherent powers of the Court.

[5] An affidavit must reply specifically to allegations; if it does not, then those allegations not replied to must be taken to have been accepted.

[6] The phrase "reasonable time" in O. 2 r. 2(1) of the SCR means 'a reasonable time after becoming aware of the irregularity.' In the instant case, the respondent had taken steps to vacate the irregular proceedings within a reasonable time after becoming aware of it. Furthermore, neither the fact that the respondent filed a reply to the appellants' counterclaim nor the fact that the case had been set down for hearing were relevant as they happened before the respondent became aware of the irregularity.

[7] Knowledge of facts plays a dominant role in the law of estoppel. When the respondent filed his reply to the counterclaim he had only one course open to him as he had no knowledge of the other; therefore, the doctrine of election has no application here. With regard to the doctrine of acquiescence the respondent also lacked the necessary knowledge. Furthermore, there can be no estoppel against a statute. In the result, the respondent could not be estopped from applying to set aside the appellants' counterclaim.

[Appellants' appeal against striking out of their counterclaim dismissed.]

Cases referred to:

Lee Tsing Choy v. Johari bin Jaalam [1984] 1 CLJ 94 ***(refd)***

Bank Bumiputra Malaysia Bhd. & Anor. v. Lorraine Esme Osman [1987] 2 MLJ 633 ***(cit)***

Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd. [1985] 1 MLJ 7 ***(foll)***

Ng Yee Fong & Anor. v. EW Tallalla [1986] 1 MLJ 25 ***(cit)***

Shanghai Hall Ltd. v. Town House Hotel Ltd. [1967] 1 MLJ 223 ***(cit)***

Khan Kam Chee v. Loke Wan Yat Realty Sdn. Bhd. [1974] 1 MLJ 206 ***(refd)***

Bank Bumiputra Malaysia Bhd. v. Sal Enterprise Sdn. Bhd. & 3 Ors. [1994] 3 CLJ 289 ***(cit)***

"Hoe Lee" Owners of Cargo Ex "Kuala Kangsar" v. Owners of "Hoe Lee" [1970] 1 MLJ 45 ***(cit)***

Impex Transport v. AG Thames Ltd. [1982] 1 All ER 894 ***(foll)***

CSI International Co. Ltd. v. Archway Personnel (Middle East) Ltd. [1980] 3 All ER 215 ***(foll)***

In Re Pritchard (decd) [1963] 1 Ch. 502 ***(foll)***

Kuah Kok Kim v. Chong Lee Leong Seng Co. (Pte.) Ltd. [1991] 2 MLJ 129 ***(refd)***

Harkness v. Bell's Asbestos and Engineering Ltd. [1966] 3 All ER 843 ***(foll)***

Metroinvest Anstalt v. Commercial Union [1985] 2 All ER 318 ***(refd)***

The Official Receiver, Liquidator of Kason Textile Industries Pte. Ltd. v. QBG Insurance (International Ltd.) [1989] 1 MLJ 1 ***(refd)***

Bernstein & Anor. v. Jackson & Ors. [1982] 2 All ER 806 ***(refd)***

Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd. [1993] 1 CLJ 487 ***(refd)***

Leal v. Dunlop Bio-Processes International Ltd. [1984] 2 All ER 207 ***(foll)***

Knighthood Assurance Consultants Ltd. v. Meacher [1976] 120 SJ 117 ***(refd)***

Supuletchimi a/p Karpaya v. Palmco Bina Sdn. Bhd. [1994] 2 CLJ 1191 ***(refd)***

Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd. [1984] 2 MLJ 143 ***(refd)***

Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd. 4 WW 542 ***(foll)***

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd. Garnishee) [1990] 1 MLJ 445 ***(refd)***

Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 MLJ 178 ***(foll)***

Re ABZ (An Infant) [1992] 2 SLR 442 ***(refd)***

Pontin v. Wood [1962] 1 QB 594 ***(refd)***

Fry v. Moore [1889] 23 QBD 395 ***(refd)***

Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 ***(foll)***

Foo Loong Lithographer Pte. Ltd. v. Mun Hean Realty Pte. Ltd. [1989] 2 MLJ 80 ***(refd)***

Overseas Chinese Banking Corp. Ltd. v. Eastern Auto Co. Ltd. [1961] MLJ 300 ***(refd)***

Chew Geok Lin v. Pau Ping Kwang [1965] MLJ 25 ***(refd)***

Legislation referred to:

Interpretation Act 1967, s. 3

Rules of the High Court 1980, O. 15 r. 2(1), O. 18 r. 19, O. 20 rr. 3, 5(1), 5(2), 5(3), 5(4), 5(5), O. 92 r. 4

Rules of the Supreme Court [UK], O. 2 rr. 1, 2, O. 6 r. 7, O. 12 r. 8, O. 60 r. 8, O. 70 r. 1

Subordinate Court Rules 1980, O. 2 r. 1(1), 1(2), O. 4 r. 4(1), O. 8 rr. 1(1), 2(1), 5(2), 6, 7, 8, O. 15 r. 1(1), O. 53 r. 11

Other sources referred to:

Black's Law Dictionary, 6th Edn.

Halsbury's Law of England, 4th Edn., Vol. 37, paras. 14, 36

The Law Relating to Estoppel, Spencer, Bower & Turner, 3rd Edn. (1977), paras. 310, 322

The Subordinate Courts Practice, K.S. Dass & Abdul Hamid, p. 132

The Supreme Court Practice 1985, Vol. 1, pp. 304, 337

For the appellants - Amar Chand Vohrah; M/s. Vohrah & Tan Chee Lan
For the respondent - L.K Tiu; M/s. Koh Leng & Co.

JUDGMENT

Augustine Paul JC:

On 10 June 1992 Ong Eng Hin (the respondent in the appeal before me) had filed a claim against Mr. Yoke Kwei and Chee Mian Poon (the appellants) in the Magistrate's Court at Melaka for an order, *inter alia*, that they do deliver vacant possession of premises known as No. 81 Jalan Munshi Abdullah, Melaka. The appellants filed their statement of defence on 24 August 1992. The pleadings were deemed to have closed 8 September 1992. The respondent then made an application to the Magistrate's Court for leave to amend his statement of claim to alter the number of the premises appearing therein from "81" to "81A & B". The application was allowed. The amended statement of claim was then served on the appellants on 11 May 1993. On 2 September 1993, the appellants, without leave of Court, filed an amended defence which had a counterclaim added to it. The respondent then filed his reply to the amended defence and counterclaim on 26 October 1993 and subsequently wrote to the Magistrate's Court on 25 August 1994 complaining that the appellants' counterclaim had been made without leave of Court. On 5 September 1994 the respondent filed an application, *inter alia*, to strike out the counterclaim. This application was allowed by the learned Magistrate. The appeal before me is by the appellants against this order. For ease of reference the Subordinate Court Rules 1980 and the Rules of the High Court 1980 will hereafter be referred to as 'the SCR' and 'the RHC' respectively.

In her grounds of judgment the learned Magistrate said that she allowed the respondent's application because the counterclaim had not been added to the original statement of defence. She referred to the *Subordinate Courts Practice* by K.S. Dass and Abdul Hamid were the learned authors had this to say at p. 132:

> ... A defendant who has any claim against the plaintiff may, instead of bringing a separate action, make a counterclaim in respect of his claim and this he can do so by adding the counterclaim to his defence. SCR 1980 O. 8 r. 2(1).

She said that there is no provision in the SCR authorising a counterclaim to be added to an amended defence. In support she referred to *Lee Tsing Choy v. Johari bin Jaalam* [1984] 1 CLJ 94 where the High Court allowed an application to amend the defence but disallowed the application to add a counterclaim. Finally she said that allowing the counterclaim to stand will prejudice the case for the respondent.

Before me learned Counsel for the appellants contended that if the respondent is allowed to amend his statement of claim then it is their right to amend their statement of defence and add a counterclaim, if any. He said that the SCR is silent on the requirement of leave of Court for that purpose. He then argued that as the respondent had taken a fresh step in the proceedings by filing a reply and defence to counterclaim to the amended defence and counterclaim he was precluded from objecting to the counterclaim. He further said that it was too late for the respondent to raise any objection as the application to strike out the counterclaim was made after a delay of 10 months and 9 days and after the case had been set down for trail. In support he cited *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1987] 2 MLJ 633 where Zakaria Yatim J (as he then was) in construing O. 18 r. 19 of the RHC 1980 said to p. 635:

> The rule does not specify a time limit during which party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See the *Supreme Court Practice* (1985) Vol. 1, p. 304.

Learned Counsel also contended that the respondent was estopped from raising any objection by reason of his conduct. He referred to *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 MLJ 7 where Lord Templeman said at pp. 11-12:

> In Spencer, Bower and Turner, '*The Law Relating to Estoppel by Representation*' 3rd Edn. (1977), para. 310 summarises the doctrine of election as applied to the law of estoppel in these terms:

> Where A dealing with B is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be confronted with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the trial Judge and relinquished the right to appeal for that order to be set aside and for specific performance to be substituted. Paragraph 322 of the cited work by Spencer, Bower and Turner relating to election in the conduct of litigation is in these terms:

> Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favor, was wrongly decided as to the residue.

Learned Counsel further said that by virtue of the doctrine of acquiescence the respondent was precluded from complaining. He referred to *Ng Yee Fong & Anor. v. E.W Talalla* [1986] 1 MLJ 25 where Mohamed Azmi SCJ said at p. 27:

> The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element of laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Busche v. Alt* [1878] 8 Ch. D. 286, 314).
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> ...
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> Paragraph 1474 on the subject of '*Elements in the Estoppel*' states:
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> When A stands by while his right is being infringed by B the following circumstances must as a general rule be present in order that the estoppel may be raised against A:
>
> (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted;

(2) B must expend money, or do some act, on the faith of his mistaken belief, otherwise, he does not suffer by A's subsequent assertion of his rights;

(3) Acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights;

(4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake;

(5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal rights.

He also contended that the learned Magistrate erred in relying on *Lee Tsing Choy v. Johari bin Jaalam* [1984] 1 CLJ 94. On the finding by the learned Magistrate that the counterclaim will prejudice the case for the respondent he referred to *Shanghai Hall Ltd. v. Town House Hotel Ltd.* [1967] 1 MLJ 223 where the Federal Court held that as the issues raised by the claim and counterclaim arose out of the same subject matter both the claim and the counterclaim should have been allowed to have been tried together.

Learned Counsel for the respondent in his reply said that pursuant to the provisions of O. 8 r. 2(1) of the SCR the counterclaim must have been added to the original defence. The said rule reads as follows:

2(1) Subject to r. 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so he must add the counterclaim to his defence.

He then referred to *Khan Kam Chee v. Loke Wan Yat Realty Sdn. Bhd.* [1974] 1 MLJ 206 and *Lee Tsing Choy v. Johari bin Jaalam* [1984] 1 CLJ 94 in support. In contending that the appellants' right to amend without leave is limited following the amendment made by him with leave he referred to The *Supreme Court Practice* 1985 where it is stated at p. 337 as follows:

Where the plaintiff is given leave to amend his statement of claim, the defendant is not entitled, in the absence of express leave to do so to introduce any amendment that he chooses, but his implied right to amend his defence is limited to making only such amendments as are consequential upon the amendments made to the statement of claim, i.e. it extends to amending only those parts of the defence which relate to the amended allegations made in the statement of claim and does not extend to the parts which relate to allegations in the statement of claim not affected by the amendments made therein: *Squire v. Squire* [1972] Ch. 391; [1971] 1 All ER 89.

He then quoted *Bank Bumiputra Malaysia Bhd. v. Sal Enterprise Sdn. Bhd. & 3 Ors.* [1994] 3 CLJ 289 where it was held that the defendant's right to introduce the counterclaim is within the time provided for service of the defence and as the appellants in the present case have failed to exercise that right in time that right is gone. With regard to the appellants' reliance on estoppel learned Counsel said that estoppel does not operate against a statute. He concluded by submitting that as the counterclaim had been introduced without leave of Court it is a nullity and relied on *The "Hoe Lee": Owners of Cargo Ex "Kuala Kangsar" v. Owners of "Hoe Lee"* [1970] 1 MLJ 45 which had followed *In Re Pritchard (decd.)* [1963] 1 Ch. 502.

In the light of the submissions of both parties the following matters required deliberation:

(i) whether the appellants were entitled to add the counterclaim to the defence after the defence had been filed;

(ii) whether the appellants' made the counterclaim in a proper manner;

(iii) whether the conduct of the respondent affected his rights; and

(iv) whether the counterclaim would prejudice case for the respondent.

It will be recalled that the appellants added the counterclaim to their amended defence after the respondent had amended his statement of claim with leave of Court. On 11 May 1993 the amended statement of claim was served on the appellants who filed their amended defence and counterclaim on 2 September 1993 - after a lapse of almost four months.

As pointed out by learned Counsel for the respondent, O. 8 r. 2(1) of the SCR provides that where a defendant in any action alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter he may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so he must add the counterclaim to his defence. Does this rule mean that a counterclaim, if any, must come with the defence when it is originally filed? Alternatively, can a defendant, having filed a defence, subsequently amend his defence by adding a counterclaim? This matter has been alluded to in some local cases.

In *Khan Kam Chee v. Loke Wan Yat Realty Sdn. Bhd.* [1974] 1 MLJ 206 Mohamed Azmi J (as he then was) had this to say at p. 208:

> To digress a little, in the case of *Tham Hoeng Meow v. Allied Timber Co. Ltd.* CS No. 189/71 (unreported) which was referred to by Mr. Thayalan, I had the occasion to express my doubt as to the desirability of allowing a counterclaim To be included for the first time after the close of pleadings, as I was of the

> view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time.

This passage found favour with Zakaria Yatim J (as he then was) in *Lee Tsing Choy v. Johari bin Jaalam* [1984] 1 CLJ 94 where his Lordship said at p. 96:

> In the proposed amended defence, the defendant also included a counterclaim, where he was claiming from the plaintiff a sum of RM7,000 less retention overpaid to the plaintiff which was not done. The counterclaim was introduced for the first time after the close of the pleadings. I entirely agree with the view expressed by Mohamed Azmi J (as he then was) in the *Khan Kam Chee's* case, *supra*, where he said:
>
> > I had occasion to express my doubt as to the desirability of allowing a counterclaim to be included for the first time after the close of pleadings, as I was of the view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time.
> >
> > In that case he dismissed the application to include a counterclaim against the plaintiff for the first time. In the circumstances, I allow the defendant leave to amend his statement of defence as proposed, but dismiss his application to include the counterclaim.

As the above two cases were proceedings commenced in the High Court the applicable rules are the RHC. Quite obviously, the applications to add a counterclaim in the two cases that I have referred to were not allowed on the basis that an amendment to include a counterclaim cannot be allowed if it was not already part of the original defence. With the utmost respect, I am unable to see any such restriction in O. 15 r. 2(1) of the RHC which deals with counterclaims and O. 20 of the RHC which deals with amendments. Order 20 r. 3 of the RHC provides for amendments that can be made to pleadings without leave of Court and r. 5(1) of the same order is a general provision that allows amendments to be made with lease of Court. It must be noted that the word "amendment" as defined in *Black's Law Dictionary*, 6th Edn., means:

> To change or modify for the better. To alter by modification, deletion or addition.

Thus an amendment to a pleading can include the addition of something that was originally not in it. This, to my mind, means that a counterclaim can be added to a defence by way of amendment. In accordance with O. 20 of the RHC it can be done without leave of Court before pleadings are closed and after close of pleading with leave. Furthermore O. 15 r. 2(1) of the RHC which provides that a defendant "... may, instead of bringing a separate action,

make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence" merely says that the counterclaim must be added to the defence. I does not say that if must form part of the original defence. The object of adding it to the defence is only to minimise the pleadings. Thus it can added to the defence at any stage of the proceedings. I find support for this proposition in some English decisions. In *Impex Transport v. A.G. Thames Ltd.* [1982] 1 All ER 894 Robert Goff J said at p. 905:

> An action is, of course, commenced by the formal step of the issue of a writ; one would expect to find a similar formal step for the initiation of a counterclaim, and the only comparable step appears to be the service of a counterclaim, **either together with or subsequently added to the defence**, or the service of some other document which, by virtue of some order of the Court, is to stand as a counterclaim, as for example when the Court makes an order dispensing with pleadings.
> (Emphasis added).

In *C.S.I International Co. Ltd. v. Archway Personnel (Middle East) Ltd.* [1980] 3 All ER 215 Roskill LJ said that a counterclaim may be made upto the time where there is a judgment which has not been stayed. His Lordship added at p. 220 that:

> ... when the plaintiff has received full satisfaction of the judgment which he has obtained against the defendant, I do not think there is still extant any action by the plaintiff in which the defendant could properly counterclaim against him.

Be that as it may, the power of the Court to allow such an amendment is subject to the injunction contained in O. 20 r. 5(2) and (5) of the RHC which read as follows:

> (2) Where an application to the Court for leave to make the amendment mentioned in para. (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ had expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (5) An amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

The general power to amend under O. 20 r. 5(1) is subject to sub-r. (2) which says that where an application for leave to make an amendment is made **after** any relevant period of limitation current at the date of issue had expired then it shall be allowed in the circumstances mentioned in sub-rr. (3), (4) and

(5) - In my opinion the restriction placed by sub-r. (2) does not apply where the application for leave to amend is made before the expiry of the limitation period. Thus in such circumstances an application to add a counterclaim can be made under O. 20 of the RHC. In the case of the subordinate Courts the equivalent provision is O. 15 of the SCR. Accordingly, an application to add a counterclaim can be made at any time provided the limitation period has not expired.

The corollary is whether leave of Court is required under the SCR to add a counterclaim by war of an amendment. The RHC makes distinct references to amendments with leave and without leave. In the case of the subordinate Courts the relevant provision is O. 15 r. 1(1) of the SCR which reads as follows:

> Subject to O. 8 rr. 6, 7 and 8 and the following provisions of this rule, the Court may at any state of the proceedings allow the plaintiff to amend his summons, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

In my opinion the words "... the Court may ... allow ..." presupposes the fact that the Court must be moved before it can be in a position to allow an application to amend. The result is that amendments to pleadings under the SCR, whether before or after close of pleadings, can be made only with leave of Court. However, the SCR contain no provisions dealing with consequential amendments by the other party following an amendment to a pleading unlike O. 20 r. 3 of the RHC which allows such amendments. Notwithstanding the absence of any such provision in the SCR, the High Court procedure may be adopted by the subordinate Courts in accordance with O. 4 r. 4(1) of the SCR which provides that in any matter of procedure or practice not provided for the procedure and practice for the time being in force or in use in the High Court shall, as near as may be, be followed and adopted. The addition of a counterclaim is clearly not a consequential amendment following the amendment to the statement of claim by the respondent. In the upshot, the addition of the appellants' counterclaim to their defence is in contravention of O. 15 r. 1(1) of the SCR as they had done so without leave of Court. That leads to a consideration of the effect of an amendment made without leave of Court as done by the appellants in the appeal before me. Learned Counsel for the respondent contended that it is a nullity.

The answer to this issue can be found in O. 2 r. 1(1) and (2) of the SCR which read as follows:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the

requirements these rules whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.

(2) Subject to para. (3), the Court may, on the ground that there has been such a failure as is mentioned in para. (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

Order 2 r. 1 says in unambiguous terms that a failure to comply with the rules shall be treated as an irregularity and shall not nullify the proceedings. The distinction between a nullity which is not curable and an irregularity which can be cured under O. 70 r. 1 of the then English Rules of the Supreme Court was exhaustively dealt with in *In Re Pritchard (decd.)* [1963] 1 Ch. 502 where Upjohn LJ said at pp. 523-524:

I do not think that the earlier cases or the later *dicta* upon them prevent me from saying that, in my judgment the law when properly understood is that O. 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of O. 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of those entitled to complain of the defect *ex debito justitiae*. Lord Denning in *MacFay* pointed out that a useful test was whether the defect could be waived. I agree with that as a good common sense text, but I also agree with Mr. Rubin that it cannot be a completely legal text, for until you have decided whether the proceeding is a nullity, you cannot decide whether it is capable of waiver.

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all ... (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings. (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement.

However, it must be noted that O. 70 r. 1 of the English rules has now been replaced with the new O. 2 rr. 1 and 2 which are *in pari materia* with O. 2 rr. (1) and (2) of the SCR. In interpreting the new English O. 2 r. (1) Lord Denning MR emphatically stated in *Harkness v. Bell's Asbestos and Engineering Ltd.* [1966] 3 All ER 843, after having referred to *In Re Pritchard (decd.),* that the position has now changed. This is what his Lordship said at pp. 845-846:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible ... for an honest litigant in the Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." That could not be said in 1963; (see *Re Pritchard (decd.)* [1963] 1 All ER 873 at 879; [1963] Ch. 502 at 518); but it can be in 1966. The new rule does it.

The *dicta* of Lord Denning MR found favour with the Singapore Court of Appeal where Thean J in delivering the judgment of the Court in *Kuah Kok Kim v. Chong Lee Leong Seng Co. (Pte.) Ltd.* [1991] 2 MLJ 129 said at p. 134:

> This rule is identical with O. 2 r. l of the Rules of Supreme Court in England, and in *Harkness v. Bell's Asbestos & Engineering Ltd.* [1967] 2 QB 729 at pp. 735-736, Lord Denning MR had this to say with regard to this rule:
>
> > This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is hence forward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice. That may be the true effect of O. 2 r. 1.

On the new English rule *Halsbury's Laws of England* 4th Edn., Vol. 37 says at para. 36:

> This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity. Under the former rule, which it replaced, a distinction was drawn between a non-compliance which rendered the proceedings a nullity, in which case the Court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings irregular in which case the Court had a discretion to amend the defective proceedings as it thought fit. The modern rule has done away with this old distinction, and every omission or mistake in practice or procedure is to be regarded as an irregularity which the Court can and should rectify as long as it can do so without injustice.

It is therefore clear that pursuant to O. 2 r. 1(1) of the SCR the old distinction between nullities and irregularities has ceased to exist. However, in accordance with O. 2 r. 1(2) of the SCR the discretion is still with the Court to decide whether it will exercise the powers entrusted to it to remedy an irregularity. Judicial activism has placed some guidelines on the exercise of that discretion. Lord Denning MR himself said in the *Harkness* decision that an omission or

mistake should be rectified - "... so long as it can do so without injustice." Cumming-Bruce LJ in considering the way in which the Court should exercise its discretion to rectify an irregularity said in *Metroinvest Anstalt v. Commercial Union* [1985] 2 All ER 318 at p. 324:

> I would say that in most cases the way in which the Court exercises its powers under O. 2 r. 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O. 2 r. 1(2) as being so framed as to give the Court the widest possible power in order to do justice.

On the same issue Wee Chong Jin CJ said in *The Official Receiver, Liquidator of Jason Textile Industries Pte. Ltd. v. OBG Insurance (International) Ltd.* [1989] 1 MLJ 1 at p. 3:

> It follows that if the non-renewal of the writ is an irregularity that can be cured under O. 2 r. 1, the next question is as to the exercise of the Court's discretion whether or not to cure such irregularity. In this respect, the principle is clear that the Court's power to cure an irregularity under O. 2 r. 1, in the first place, can only be exercised if the Court could have properly granted the order for which there was a failure to apply, had there also been an application made pursuant to the relevant provision in the rules. In other words, the power in O. 2 r. 1 to cure irregularities is subject to the same principles which govern an ordinary application made under the relevant rule.

In *Bernstein & Anor. v. Jackson & Ors.* [1982] 2 All ER 806 it was held that where the irregularity sought to be cured amounted to a fundamental defect in the proceedings then the Court should not exercise its discretion under O. 2 r. 1 to rectify it. In adopting this case Thean J said in the *Kuah Kok Kim* decision at 134:

> Notwithstanding the very wide powers given to Court to remedy non-compliance with the Rules of Supreme Court 1970 there may be failure or non-compliance with the rules which is so fundamental or serious that the Court ought not to exercise its discretion under r. 1 to remedy it.

In *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd.* [1993] 1 CLJ 487; [1993] 1 MLJ 283 James Foong J set aside an order made on the ground that the failure to comply with the statutory requirements in that case was fundamental and serious. In *Leal v. Dunlop Bio-Processes International Ltd.* [1984] 2 All ER 207, the plaintiff obtained the issue of a writ, to be served out of jurisdiction, without leave of the Court as required by O. 6 r. 7 of the Rules of Supreme Court. He then served the writ out of jurisdiction without first obtaining leave of the Court as required by O. 6 r. 7. The defendants applied under O. 12 r. 8 to set aside the service

by reason of these irregularities. By this time the writ's validity had expired and the limitation period had passed. The plaintiff therefore cross-appealed for the renewal of the writ and for leave to serve out of jurisdiction. The Court of Appeal had no hesitation in holding that irregularities of these kind are curable. Stephenson LJ said at p. 212:

> Order 2 r. 1 gives the Court the power to make good the service of the writ and the Judge could have given leave retroactively.

May and Slade LJJ said in that case that only in an exceptional case should the Court, in the exercise of its power retroactively to make good, irregular service of a writ out of jurisdiction, validate after the event the purported service out of jurisdiction without leave of process issued by an English Court. The Court, however, retracted its support from the view expressed in the *Bernstein* decision that O. 60 r. 8 provided an exclusive path for the renewal of writs and that irregularities in issue could not be cured under O. 2 r. 1. Slade LJ, who was a party to both decisions, agreed. In commenting on the *Leal* decision the [1984] All ER Rev. says this at p. 220:

> It may therefore be taken to be settled that the Court has jurisdiction under O. 2 r. 1 to cure irregular service of a writ, even by giving retroactive leave for its service out of the jurisdiction.

It has also been held that failure to obtain leave before setting down an appeal is an irregularity only and does not render the notice of appeal a nullity (see *Knighthood Assurance Consultants Ltd. v. Meacher* [1976] 120 SJ 117).

In adopting the views expressed in the *Leal* decision I am of the opinion that where an amendment to a pleading has been made without leave of Court as required by O. 8 r. 1(1) of the SCR it amounts to an irregularity which can be cured retroactively under O. 2 r. 1. In the circumstances the addition of the counterclaim by the appellants in the appeal before me without leave of Court is an irregularity that can be remedied. However, no application was made by the appellants to have the irregularity rectified. In the event the counterclaim still remains as an irregularity.

I interpolate to refer to O. 53 r. 11 of the SCR which reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent power of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

This rule deals with the inherent power of the Court. Learned Counsel for the respondent submitted before the learned Magistrate that this rule overrides O. 2 r. 1 and that therefore the addition of the counterclaim should be regarded

as a nullity in the interests of justice. He probably had in mind *Suppuletchimi a/p Karpaya v. Palmco Bina Sdn. Bhd.* [1994] 2 CLJ 1191. It is said that the overriding feature of the inherent jurisdiction of the Court is that it is a part of procedural, and not substantive law; that it is exercisable by summary process, without plenary trial; that may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not (see *Halsbury's Laws of England* 4th Edn., Vol. 37 para. 14). In *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143 Edgar Joseph Jr J (as he then was) said at p. 147 that, "... it is clear that the inherent jurisdiction of the Court includes all the powers that are necessary to fulfill itself as a Court of law; to uphold, to protect, and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner." The question that arises for consideration is whether the inherent jurisdiction of the Court is capable of overriding any specific provision of the SCR, and in particular O. 2 r. 1 as contended by learned Counsel.

The starting point for the answer to this question is *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.* 4 WW 542 where the Court of Appeal of Manitoba in adopting a passage from Sir Jack Jacob's article entitled *The Inherent Jurisdiction of the Court* said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being a reserve or fund of powers, a residual sources of powers, which the Court may drawn upon as necessary whenever it is just or equitable to do so; in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. In *Loo Chay Meng v. Ong Cheng Hoe (Gamud Sdn. Bhd. Garnishee)* [1990] 1 MLJ 445 V.C. George J (as he then was) held that in a situation where a *lacuna* exists in the RHC and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies, the Court is then not only entitled to fill the gap by using its inherent jurisdiction, but is obliged to do so, in order to avoid an injustice. In *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143 Edgar Joseph Jr. J (as he the was) said that the Court has jurisdiction to grant a Mareva injunction in the exercise of its inherent jurisdiction. This shows that the inherent power of the Court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules. However, the inherent powers cannot be invoked to override express provisions in the rules. The limitation on the use of the Court's inherent jurisdiction was laid down by the Supreme Court in *Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors.* [1988] 1 MLJ 178 where Syed Agil Barakbah SCJ in referring to O. 92 r. 4 of the RHC, where is *in pari materia* with O. 53 r. 11 of the SCR, said at p. 181:

> It follows that where the rules contain provisions making available sufficient remedies, the Court will not invoke its inherent powers.

This is illustrated by *Re ABZ (An Infant)* [1992] 2 SLR 442 where an application to set aside an adoption order in the exercise of the Court's inherent jurisdiction was refused as the Adoption of Children Act 1930 provided a remedy for re-adopting the child. In the circumstances O. 2 r. 1 of the SCR is not affected by the inherent powers of the Court.

As I have found that the addition of the counterclaim by the appellants is an irregularity and still remains so the remaining matter for deliberation is whether the conduct of the respondents can be said to have waived the irregularity. In particular I shall first refer to the steps taken by the respondent after the addition of the counterclaim. Learned Counsel for the appellants contended that the fact that the respondent had filed a reply and defence to counterclaim and that the case had already been fixed for hearing on 5 October 1995 had just that effect. He relied on O. 2 r. 2(1) of the SCR which reads as follows:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

As provided by the rule the application must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. In *Pontin v. Wood* [1962] 1 QB 594 an application to set aside a write for not disclosing a cause of action more than four months after service of writ was held to be not within a reasonable time. In *Fry v. Moore* [1889] 23 QBD 395 the step taken by the defendant to defend the case on the merits despite knowledge of the irregularity was held to be a waiver.

In his affidavit affirmed on 5 September 1994 learned Counsel for the respondent has explained the reason for his delay in filing the application to set aside the counterclaim. This is what he said in para. 6:

> Saya baru sahaja mendapat tahu bahawa tidak ada sebarang perintah yang dikeluarkan oleh yang arif tuan Majisteret untuk meminda dan memfailkan pindaan pernyataan pembelaan dan tuntutan balas. Sesalinan minit bertarikh 23 Ogos 1993 yang telah firma saya terima pada 25 Ogos 1994 adalah dilampirkan di sini dan ditandakan sebagai eks. ACV.

Promptly, learned Counsel wrote to the Court by letter dated 25 August 1994 saying that the counterclaim had been made without leave of Court. He then applied to the Court on 5 September 1994 to set aside the counterclaim. None of the assertions made by him in his affidavit were denied or disputed by the appellants. In *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.*

[1986] 1 MLJ 382 it was held that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted. In the appeal before me no affidavit in reply had been filed. Thus, I am compelled to accept the contents of the respondent's affidavit to be the truth as I have no good reason for not doing so. In *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd.* [1993] 1 CLJ 487; [1993] 1 MLJ 284 the defendant's private liquidator who was recently appointed only became aware of the irregularity after his appointed only became aware of the irregularity after his appointment. It was held that the application to set aside, although brought some six years later was within a reasonable time. In my opinion, therefore, the "reasonable time" in O. 2 r. 2(1) of the SCR means a reasonable time after becoming aware of the irregularity. Thus, it is my view that the respondent had taken steps to vacate the irregular proceeding within a reasonable time after becoming aware of it. Furthermore, neither the fact that he filed the reply and defence to counterclaim nor the fact that the case had been set down for hearing is relevant as that had occurred before he became aware of the irregularity.

Finally, I shall consider whether the conduct of the respondent estops him from asserting his rights. Knowledge of facts plays a dominant role in the law of estoppel. In *Meng Leong Development Pvt. Ltd. v. Jip Hong Trading Co. Pvt. Ltd.* [1985] 1 MLJ 7 Lord Templeman said that it is the essence of the doctrine of election that the party electing shall be confronted with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice. When the respondent filed his reply and defence to counterclaim he had only one course open to him as he had no knowledge of the other. Thus the doctrine has no application on the facts of this cases. With regard to the doctrine of acquiescence the case cited by learned Counsel for the appellants also requires knowledge which, as I have said, the respondent did not have. In any event the objection of learned Counsel based on estoppel cannot stand as there can be no estoppel against a statue (see *Foo Loong Lithographer Pte. Ltd. v. Mun Hean Realty Pte. Ltd.* [1989] 2 MLJ 80 and *Overseas Chinese Banking Corpn. Ltd. v. Eastern Auto Co. Ltd.* [1961] MLJ 300 and *Chew Geok Lin v. Pau Ping Kwong* [1965] MLJ 25). For this purpose the SCR is clearly a subsidiary legislation within the meaning of s. 3 of the Interpretation Act 1967 and has statutory force (see *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143). Accordingly, it is my view that the respondent is not estopped from applying to set aside the counterclaim.

In the light of what I have said thus far it is unnecessary for me to consider whether allowing the counterclaim to stand will prejudice the case for the respondent. Suffice it for me to say that the finding by the learned Magistrate on this aspect is groundless.

In the upshot I dismissed the appeal with costs.

Reported by Gan Peng Chiang
& Harjit Singh Pannu